

APPEAL NO. 172396
FILED NOVEMBER 17, 2017

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 6, 2017, in (city), Texas, with (administrative law judge) presiding as the administrative law judge (ALJ). The ALJ resolved the disputed issues by deciding that the respondent (claimant) sustained a compensable injury on (date of injury), and that the claimant had disability resulting from the compensable injury from (date of injury), through the date of the CCH.

The appellant (carrier) appealed the ALJ's determinations as being contrary to the great weight and preponderance of the evidence. The carrier also attached medical records from Hospital received subsequent to the CCH on September 6, 2017, for consideration as newly discovered evidence.

The claimant responded, urging affirmance.

DECISION

Reversed and remanded.

The claimant claims to have sustained a work-related injury on (date of injury), while using a sledgehammer to break down a building form. The claimant testified that he felt a sharp pain in his right groin area and that he sought medical attention in the hospital emergency room on Tuesday, April 4, 2017, where he was diagnosed with a hernia. The claimant offered into evidence a three-page information sheet entitled Inguinal Hernia, Adult, ostensibly provided him at the emergency room together with a medical report dated May 19, 2017, from his treating doctor, (Dr. J) assessing a right inguinal hernia and a Texas Workers' Compensation Work Status Report (DWC 73) from Dr. J dated May 19, 2017, finding the claimant incapable of working in any capacity beginning May 19, 2017, and continuing through June 21, 2017. A second DWC-73 from (Dr. T) finds the claimant incapable of working in any capacity beginning June 26, 2017, and continuing through July 26, 2017. The claimant further testified that he had never had a hernia prior to the claimed injury on (date of injury).

NEWLY DISCOVERED EVIDENCE

Documents submitted for the first time on appeal are generally not considered unless they constitute newly discovered evidence. See *generally*, Appeals Panel Decision (APD) 091375, decided December 2, 2009; *Black v. Wills*, 758 S.W.2d 809

(Tex. App.-Dallas 1988, no writ). In determining whether new evidence submitted with an appeal or response requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. See APD 051405, decided August 9, 2005.

The carrier submits for the first time on appeal medical records from Hospital dated May 23, 2016, pertaining to treatment received by the claimant on such date for complaints of right foot numbness. Such records also contain a diagnosis of right inguinal hernia and refer the claimant for follow up within 1 to 2 days. Also submitted are medical records from Hospital dated April 7, 2017, which reflect that, on that date, the claimant sought treatment in the emergency department with complaints of right groin pain which began "Friday while working construction." The April 7, 2017, hospital records further reveal that the claimant denied history of a previous hernia.

We agree that the documents submitted by the carrier for the first time on appeal meet the requirements for newly discovered evidence. A review of the record reveals that the carrier requested authorization from the claimant to obtain pertinent medical records on May 2, 2017, shortly after the claim was filed, and again on August 2, 2017, 2 days following the benefit review conference in this matter. Having received no medical authorization from the claimant, the carrier requested a subpoena on August 14, 2017, ordering production of the offered records. A subpoena was issued by the Texas Department of Insurance, Division of Workers' Compensation (Division) on August 21, 2017, and served on Hospital on or about August 24, 2017. In its Supplemental Request for Review, the carrier indicates the requested records were received from the hospital on October 6, 2017, one month following the CCH. We accordingly find that the evidence came to the knowledge of the carrier after the hearing, that it is not cumulative of the other evidence in the record and that the carrier's failure to offer the evidence at the CCH was not due to a lack of diligence on its part. We further note that the medical records submitted with the carrier's appeal could result in a different decision by the ALJ. We therefore find this case to be one of those few circumstances where the carrier has provided newly discovered evidence on appeal which warrants a remand based on that evidence.

We reverse the ALJ's determinations that the claimant sustained a compensable injury on (date of injury), and that the claimant had disability resulting from the compensable injury of (date of injury), beginning (date of injury), through the date of the CCH on September 6, 2017, and remand the case for the ALJ to allow the development of the record concerning the newly discovered evidence and to permit the parties to present evidence on the merits of the claim at the CCH on remand.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the ALJ, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division pursuant, to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. See APD 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **VALLEY FORGE INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
1999 BRYAN STREET, SUITE 900
DALLAS, TEXAS 75201-3136.**

K. Eugene Kraft
Appeals Judge

CONCUR:

Carisa Space-Beam
Appeals Judge

Margaret L. Turner
Appeals Judge